Supreme Court, U.S.
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In the

Supreme Court Of The United States

No. 71-859

HENRY AND ALMETA BRADFORD,

Petitioners,

v.

WALTON E. THOMPSON; *et al,*

Respondents.

PETITION OF HENRY AND ALMETA BRADFORD FOR WRIT OF CERTIORARI

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To the Honorable Supreme Court of the United States:

Come now Henry and Almeta Bradford, Petitioners, and make this, their Application for Writ of Certiorari, and in support thereof, would respectively show unto this Court the following:

OPINIONS OF THE COURTS BELOW

The official citation for the opinions rendered by the Courts below in this cause are as follows: 460 S.W. 2d 932 (Tyler

Civ. App. — 1970); 470 S.W. 2d 633 (Tex. Sup. Ct. — 1971). Both opinions are contained in the Appendix to this Brief.

STATEMENT OF THE JURISDICTION

The decree sought to be reviewed is a Summary Judgment granted against Petitioners in favor of all Respondents by the trial Court on December 11, 1969 (T — 170). The Judgment was affirmed by the Tyler Court of Civil Appeals, 460 S.W. 2d 932, on November 19, 1970, rehearing denied December 17, 1970, and affirmed in part, reversed in part, by the Texas Supreme Court, 470 S.W. 2d 633, on July 21, 1971, rehearing denied October 6, 1971.

The statutory provision conferring jurisdiction upon this Court is Title 28 U.S.C.A., Sect. 1257 (3).

QUESTIONS PRESENTED FOR REVIEW

Point I

The holding of the Courts below denying Petitioners recovery of attorney fees against the title companies denies to Petitioners due process of law as guaranteed by the Fourteenth Amendment to the Constitution of the United States.

Point II

The refusal of the Courts below to apply Rule 94 of the Texas Rules of Civil Procedure denies to Petitioners due

process of law as guaranteed by the Fourteenth Amendment to the Constitution of the United States.

APPLICABLE PROVISIONS OF LAW

The applicable Constitutional provisions, treaties, statutes, ordinances and regulations which are involved in this case are as follows:

(1) The Due Process Clause of the Fourteenth Amendment to the Constitution of the United States;

(2) Part of Rule 94 of the Texas Rules of Civil Procedure, wherein it is provided that:

> Where the suit is on an insurance contract which insures against certain general hazards, but contains other provisions limiting such general liability, the party suing on such contract shall never be required to allege that the loss was not due to a risk or cause coming within any of the exceptions specified in the contract, nor shall the insurer be allowed to raise such issue unless it shall specifically allege that the loss was due to a risk or cause coming within a particular exception to the general liability; provided that nothing herein shall be construed to change the burden of proof on such issue as it now exists.

STATEMENT OF THE CASE

The facts of this case are quite adequately summarized by the Texas Supreme Court (470 S.W. 2d 633, 634) as follows:

> On October 13, 1964, Bradford and his wife entered into a *contract* with Style-Rite for the purchase of a house and lot situated in Dallas County for a total consideration of $8,000.00, payable $1,200 in cash, "$6,800.00 mortgage, $60.00 per month, principal and interest 6%,

plus taxes and insurance." Style-Rite did not own the property at the time the contract was executed but was in the process of buying it from Thompson. On October 15, 1964, two days after the execution of the contract, Style-Rite purchased the property from Thompson, assumed the unpaid balance due upon a note to Murray Mortgage Company in the amount of $1,553.34 (sic — should be $5,246.66) and delivered to Thompson its second lien note in the amount of $1,553.34.

Also on October 15, Style-Rite executed a *deed* conveying the property to the Bradfords. The deed recited a total consideration of $8,000, payable $1,200 in cash and the assumption of the balance due on the first lien note held by Murray Mortgage Company in the amount of $5,246.66, together with the assumption of the second lien note executed by Style-Rite to Thompson in the amount of $1,553.34. The assumption clause in the deed recited that each of said notes was payable as provided therein and was secured by a deed of trust. The deed of trust securing the second lien note named W. B. Post as the trustee. The Bradfords demanded a title policy prior to consummation of the sale. The closing of the sale took place after Fidelity Title Company agreed to issue the policy. The trustee, an agent of the title company, was in charge of the closing. The parties appeared at the title company office at various times between October 1 and October 26, 1964, bringing the signed instruments, documents and checks. The trustee subsequently recorded the deed. The title policy was received by the Bradfords in the mail around November 2, 1964. They took possession of the property here in dispute shortly thereafter. Subsequently they received the deed.

The Bradfords also received a letter dated November 11, 1964, from Security Savings Association, advising them that the $1,553.34 note assumed by them in the deed had been deposited with Security for collection. The letter indicated that $10 monthly payments

were to be made to Security beginning November 15, 1964. Thereafter, the Bradfords promptly made payments due under both of the notes. In August of 1966 they paid off the larger note Murray Mortgage Company approximately four years ahead of the maturity date. Immediately thereafter they voluntarily increased their payments on the $1,553.34 note from $10 a month to $70 per month and continued to make such payments until February 1967, when they stopped making payments. The Bradfords maintain that they stopped making their payments only because they were refused the right to pre-pay the second lien note in its entirety.

Thompson, through his attorney, by a letter dated June 5, 1967, notified the Bradfords that the second lien note was in arrears and that unless the payments were made current, the property would be posted for sale under the terms of the deed of trust. No further payments were made and the property was subsequently sold on January 2, 1968 to Thompson. Thompson called upon the Bradfords to relinquish possession but they refused; he then instituted a forcible entry and detainer suit against them, but was unsuccessful. He then brought this suit in trespass to try title. The parties were joined by the various pleadings noted above.

The Thompsons plead the title they acquired by the foreclosure sale. The Bradfords filed a general denial and a counter-claim which alleged, *inter alia*, fraud on the plaintiffs' part in connection with the inclusion of the second lien note for $1,553.34 in the terms of the deed. The Bradfords also specifically alleged that the trustee's sale of January 2, 1968, was void since there was no actual default in the payments due at that time. The Bradfords also brought cross-actions against Style-Rite and the trustee alleging fradulent misrepresentation; against the title companies for the value of their policy with those companies and for attorneys' fees; and against Security for fraudulent misrepresentation and for willfully and maliciously injuring the cross-

> plaintiffs by refusing to let them pre-pay the second lien note * * *
>
> The Bradfords had paid $700 to Security on the second lien note as of February, 1967, when only $280 would have been required to have been paid under the note's schedule of payments. As of the date of foreclosure, January, 1968, a total of $390 was required to have been paid under the terms of the note.

The Bradfords had no actual knowledge that the second lien in question was contained in their deed, as the Bradfords relied on their title policy to the exclusion of their deed in order to determine the status of their title. The title policy in question completely omitted the second lien deed of trust, and it was on this basis that the title companies were brought into the suit. The title companies' responsive pleadings consisted only of a general denial, and the policy exception was never plead affirmatively.

All parties filed Motions for Summary Judgment and all Motions for Summary Judgment were granted against the Bradfords while, at the same time, the Bradfords' Motion for Summary Judgment was denied. On Appeal, the Tyler Court of Civil Appeals affirmed the case in total, and although the Bradfords went to great lengths to point out to that Court that the title companies failed to plead the policy exception as required by Texas Rule of Civil Procedure 94, the Court's opinion completely overlooks the Point of Error.

The Texas Supreme Court granted Petitioners' Application for Writ of Error, and reversed and rendered that part of the Judgment relevant to the foreclosure, holding that the Bradfords were not in default. The Bradfords thus regained

title and possession to the property. In addition, the Bradfords briefed and argued to the Texas Supreme Court their position relevent to the title companies, with particular emphasis on the fact that the title companies could not be permitted to base their arguments on any policy exceptions due to the fact that they failed to plead any policy exceptions affirmatively as required by Rule 94. The Supreme Court's opinion makes no mention of this Point of Error having been raised, and in fact, leaves the reader with the impression that the title companies did, in fact, plead the policy exceptions in question. The Bradfords contended that their being denied recovery, premised on the fact that the policy exception had been pleaded, when in fact it was not pleaded, constituted a denial of due process of law as guaranteed to them by the Fourteenth Amendment to the Constitution of the United States.

ARGUMENTS AND AUTHORITIES

The Bradfords seek recovery against the title companies, on the title insurance policy issued, on the basis that the October 15, 1964 lien was not mentioned in the title policy as a lien or encumbrance against the property (T-24) and that the title companies were therefore obligated to discharge such lien, or to defend any suits arising out of such lien. All of these allegations were set forth in Paragraph VIII of the Bradford's Cross-Action (T-18). The title companies filed only a general denial (T-30). No supplemental or amended answer was ever filed.

In their Motion for Summary Judgment, the title companies for the first time alleged that the Bradfords' claim comes within some exceptions and exclusions of the title insurance policy (T-132);

> C. That on or about November 2, 1964, Fidelity Title Company, as agent for Security Title and Trust Company, issued Security Title and Trust Company Policy #99511, in the amount of Eight Thousand ($8,000.00) Dollars, to Henry Bradford and wife, Almeda Bradford, all as is alleged by said cross-plaintiffs, in their cross-action, by virtue of which and in accordance with the terms of which contract cross-defendants, Security Title and Trust Company and Fidelity Title Company erpressly *excepted and excluded* insurance by virtue of such losses or damages as are claimed and alleged by cross-plaintiffs herein. (emphasis added)

There is no dispute that the title policy was issued to the Bradfords, that the lien in question was not mentioned in the title policy, and therefore, unless the lien came within an exception or exclusion to the title insurance, the title companies would be liable. The title companies failed, however, to raise such exceptions and exclusions by any affirmative pleadings; and even in their Motion for Summary Judgment, did not indicate which exceptions and exclusions were relied upon. Rule 94 of the Texas Rules of Civil Procedure provides in part that:

> Where the suit is on an insurance contract which insures against certain general hazards, but contains other provisions limiting such general liability, the parties suing on such contracts shall never be required to allege that the loss was not due to a risk or cause coming

> within any of the exceptions classified in the contract, nor shall the insurer be allowed to raise such issue unless it shall specifically allege that the loss was due to risk or cause coming within a particular exception to the general liability.

The title companies, having failed to allege such exceptions, and having therefore failed to comply with Rule 94, could not avail themselves of such exceptions in their Motion for Summary Judgment. *Southern Life and Health Insurance Co. v. Simon*, 411 S.W. 2d 765, Beaumont Civ. App. (1967), revd. on other grounds 416 S.W. 2d 793; *Manhattan Fire and Marine Insurance v. Holloway*, 359 S.W. 2d 203, Austin Civ. App. (1962), ref. n.r.e.; *National Life & Accident Insurance Co. v. Leverett*, 215 S.W. 2d 939, Eastland Civ. App. (1948), dismd.; *T.I.M.E. v. Maryland Casualty Co.*, 300 S.W. 2d 68 (Tex. Sup. Ct. — 1957).

The title companies, in the Courts below, admitted that the policy exceptions had not been affirmatively alleged. Rather, their argument was that there was no necessity to have alleged any exceptions because the insuring clause of the policy itself did not extend to the loss occasioned by the Bradfords under the doctrine announced in *Merryman v. Employers Natl. Life Ins. Co.*, 416 S.W. 2d 609 (Tex. Civ. App. — 1967) ref. n.r.e. That is, the title companies refute the fact that a policy exception is in issue, and instead, argue that the insuring clause itself does not cover this type of factual situation, and that, therefore, no affirmative pleadings were necessary. The argument of the title companies is summed up on Page 4 of their Brief before the

Texas Supreme Court entitled "Response to Petitioners' Original Motion for Rehearing", wherein they argue as follows:

> The Petitioners still fail to see the distinction between a cause of action arising out of the question of whether or not the general insuring clause of an insurance policy extends to an assured and a cause of action arising as a result of a situation whereby an assured is admittedly covered under an insurance contract but the coverage withdrawn because of some specific policy exception. In the first instance a general denial, as plead by these Respondents, puts the question in issue; in the second instance, an insurer must specifically plead the policy exception.

With this argument, the title companies attempted to avoid the mandate of Rule 94.

The title companies' argument in this regard is not sound. If in fact, there was no coverage, it was only because of a policy exception. In their own Motion for Summary Judgment, the title companies admit that an exception and exclusion was involved (T-132), and both of the appellate courts below recognized this fact. If either of the courts below gave any credence to the argument on this point as raised by the title companies, then their opinions would have so stated, and the matter would have been simply disposed of. However, such a holding would have effectively negated Rule 94 for all future litigation, which the courts below were not willing to do. Both courts therefore held that the policy excep-

tions were involved. The Tyler Court of Civil Appeals pointed out that: (460 S.W. 2d 932,.939)

> While the insuring clause in the policy in question guarantees Appellants a good and indefeasible title, it contains this significant exception: "Nothing contained in this policy shall be construed as insuring against any loss or damage by reason of * * * claims arising under any obligation of the assured; * * *"

Likewise, the Texas Supreme Court points out: (470 S.W. 2d 633, 635)

> The title companies, in addition, plead that this type of "defect" of title was specifically excluded by the policy that they had issued as it was brought about by the fault of the insured.

In spite of the fact that Petitioners argued Rule 94 strenuously before both of the appellate courts below, neither court made any mention of Rule 94 in their respective opinions, but overlooked the matter altogether.

The Tyler Court of Civil Appeals, although carefully avoiding any mention of Rule 94, premised their decision on the "fact" that Petitioners' pleadings incorporated by reference the deed in which Petitioners assume the second lien (460 S.W. 2d 989). This statement of "fact" by the Tyler Court is absolutely erroneous, as the transcript so indicates (T-8-25). Although the Bradfords did attach and incorporate a copy of the title policy, this has nothing to do with the applicability of Rule 94. Rule 94 was not designed to advise the Plaintiff of what exceptions were contained within the

policy, but instead was designed to give the Plaintiff notice as to which of those exceptions, if any, the insurance company alleged to be applicable. The Texas Supreme Court in *Shaver v. National Title & Abstract Co.*, 361 S.W. 2d 867 (1962), affirms the applicability of Rule 94 to the insurance company, even though the Plaintiff in that suit attached the insurance policy in question to his Petition.

The Texas Supreme Court tackled the problem in their opinion by avoiding it altogether, and simply leaving the reader with the impression that the title companies plead the exceptions affirmatively. The transcript clearly shows that the exceptions were not affirmatively plead. (T-30).

Petitioners submit that neither of the appellate courts below could have written an opinion on Petitioners' Rule 94 argument in favor of the title companies without bringing about a drastic change in the law, and without ignoring the plain wording and intent of the Rule. However, by omitting the problem altogether, the lower courts were able to bring about a result in favor of the title insurance companies, and at the same time, leave the law unchanged. Petitioners contend that such procedures in our judicial system constitute to them a denial of due process of law as guaranteed by the Fourteenth Amendment to the Constitution of the United States. Petitioners contend that the judiciary cannot arbitrarily pick and choose which cases that the judiciary will or will not apply a statute or rule of procedure to. Such a discrimnatory procedure not only denies due process, but

denies equal protection of the law as well. All litigants should be required to follow the same procedures, and the rules of civil procedure should be applicable to all equally. The refusal of the courts below to have required the title companies to comply with Rule 94 has denied Petitioners the basic fundamental safeguards guaranteed by the Fourteenth Amendment.

Assuming arguendo that the title companies were immune from complying with Rule 94, the Bradfords take the position that they do not come within the policy exceptions as a matter of law.

According to the Bradford — Style-Rite contract, no title policy was to issue (T-72), but the Bradfords refused to consummate the closing without one (T-159). The closing itself was very unusual, in that the parties never met at the title company, but rather, between the dates of October 19 and October 26, 1964, the various parties appeared at different times with signed instruments, checks, etc. (T-159). Post was the Fidelity Title agent in charge of the closing, and was also the trustee of the *second lien* deed of trust, *which was omitted from the title policy*. Post prepared a closing statement for the Bradfords and for Style-Rite, but the Bradfords' closing statement was never given to them (Bradford Deposition — page 33). Likewise, the Bradfords never saw their deed, nor were aware of the second lien of October 15 (T-159-160). Had the Bradfords known of the second

lien, or what was in their deed, they would not have proceeded with the closing (T-158-159).

Mr. Bradford was under the belief that he could not obtain title to the Denley property without obtaining a title policy, and that it was the title policy, and not the deed, which created his title to the property (Bradford Deposition — page 6, Ln. 8 to Page 7, Ln. 25; Page 8, Ln. 15 to Ln. 24).

The most important factual consideration is that the Bradfords relied strictly on the title policy and not the deed to determine the liens and encumbrances against the property (T-159; Bradford Deposition, Pp. 6-9). In *Lawyers' Title Insurance Corp. v. Research Loan and Investment Corp.*, 361 F. 2d 764 (8th Circuit — 1966) the Court discusses precisely this type of situation with similar policy exclusions, and sets forth logical guidelines to follow. Although holding for the title company because of a distinguishing factual situation noted below, the 8th Circuit states that (P. 769):

> We must emphasize that this was not an ordinary deed nor an ordinary title insurance transaction. The deed by which Research expressly agreed to assume existing obligations was dated October 23, 1961, and was filed of record November 1, 1961. The application for title insurance was not made until November 6, 1961. *If Research had applied for title insurance prior to closing the deal, we would have an entirely different situation.* In that event, it would be reasonable to conclude that Research was relying on the title insurer to advise it of the true state of the record title and intended to assume, in the context of the policy condition, only those

> obligations which the title search revealed. However, in this case, the application for title insurance was made after the deal had been closed and there is no evidence showing that Research was relying on the title insurer to advise it of encumbrances. (emphasis added)

The Court, in setting forth the conditions under which the title insurance company would be liable, sets forth precisely those conditions which are present in the Bradford situation. Under the initial purchase contract, the provision requiring a title policy was scratched out (T-109). The issuance of this particular title policy was not just an ordinary issuance of a title policy pursuant to a closing, but it was an issuance in response to demands made by the Bradfords, which, if not met, would have prevented the closing (T-159). The Bradfords purchased and relied on the title policy to avoid the very thing which has happened and to disallow the Bradfords to recover against the title companies, under these circumstances, would be to nullify the very purpose of the title policy itself, and to deny the Bradfords due process of law as guaranteed by the Fourteenth Amendment.

WHEREFORE; PREMISES CONSIDERED, Petitioners pray that this Writ of Certiorari be in all things granted, and that upon final hearing hereon, that the Summary Judgment heretofore granted by the Courts below in favor of the title companies be reversed, and that Petitioners' Motion for Partial Summary Judgment against the title companies as to all issues except damages be reversed and rendered in favor of Peti-

tioners, and that Petitioners have such other and further relief, both general and special, legal and equitable, to which Petitioners may show themselves to be justly entitled.

MARGOLIS & STAFFIN
1226 Commerce St., Level A
Dallas, Texas 75202 742-1341

By: _____
Harry W. Margolis,
Attorney for Petitioners

CERTIFICATION OF SERVICE

I, Harry W. Margolis, Attorney of Record for Petitioners in the above cause, do hereby certify that I have, on this 23 day of December, 1971, sent by first class United States mail, postage prepaid, three copies of this Application for Writ of Certiorari to all of the following attorneys, being all of the Attorneys for Respondents, at the addresses indicated:

Mr. Clifford Thyfault
2901 Lourdes
P. O. Box 21172
Dallas, Texas 75211

Mr. Frank Cusak
Security Savings Assn.
2323 W. Illinois
Dallas, Texas

Mr. Charles H. Storey
1420 Oak Cliff Bank Tower
Dallas, Texas 75208

Mr. Edward J. Drake
3275 First Natl. Bank Bldg.
Dallas, Texas 75202

_____
Harry W. Margolis

APPENDIX A

NO. 68-2459-I

WALTON E. THOMPSON

v.

HENRY BRADFORD AND WIFE, ALMETA BRADFORD

IN THE DISTRICT COURT OF DALLAS COUNTY, TEXAS 162nd JUDICIAL DISTRICT

ORDER FOR SUMMARY JUDGMENT

ON THE 26th day of November, 1969, came on to be heard the Motion of Plaintiff Walton E. Thompson, and wife, Mary E. Thompson, (joined heretofore herein as involuntary Plaintiff), for Summary Judgment, the Motion of Defendants and the Cross-Plaintiffs Henry Bradford, and wife, Almeta Bradford; for Summary Judgment, and the Motions of Cross-Defendants, Security Savings Association, Fidelity Title Company, Security Title & Trust Company, Style-Rite Homes, Inc., and W. B. Post, for Summary Judgment in the above entitled and numbered cause, and came all the parties by their respective attorneys of record and all parties announced ready upon said Motions for Summary Judgment; and it appearing to the Court that such Motions have been made in proper form and time, that proper service thereof with respect to each of said Motions has been made and that the parties are properly before the Court for a hearing thereon; and after hearing each of said Motions and all the evidence offered thereon including the pleadings on file, the affidavits in support thereof, the deposition of Defendant, Henry Bradford, and after duly considering the same and argument of counsel, the Court is of the opinion that there is an absence of genuine issue of any material fact and that this Summary Judgment should be rendered as hereinafter provided, it is, accordingly

ORDERED, ADJUDGED AND DECREED that Plaintiff, Walton E. Thompson, and wife, Mary E. Thompson (joined as an involuntary Plaintiff herein) do have and recover judgment of and against the Defendants, Henry Bradford, and wife, Almeta Bradford, for title and possession in and to the following described premises, to-wit:

> situated in the County of Dallas, State of Texas, and being Lot 14, in Block 33/4222 of BROADMOOR ADDITION, an Addition to the City of Dallas, Texas, according to the Map of said Addition recorded in Vol. 2, Page 126, et seq. of the Map Records of Dallas County, Texas

and for all costs of suit in this behalf expended.

And, it is FURTHER ORDERED, ADJUDGED AND DECREED that the Motions for Summary Judgments of Cross-Defendants, Style-Rite Homes, Inc., W. B. Post, Security Title and Trust Company, Fidelity Title Company and Security Savings Association, be and the same are hereby in all things sustained, and that the Cross Plaintiffs, Henry Bradford, and wife, Almeta Bradford, do have and recover nothing of and from the said Cross-Defendants herein, and that the said Cross-Defendants also have and recover all their costs of suit in this behalf expended. And, it is further ORDERED that the Cross-Action of Security Savings Association against Henry Bradford, and wife, Almeta Bradford, be and the same is hereby dismissed.

AND, IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Motion for Partial Summary Judgment heretofore filed herein by Cross-Plaintiffs, Henry Bradford, and wife, Almeta Bradford, be and the same is hereby in all things denied, and that the said Cross-Plaintiffs do have and recover nothing of and from the Cross-Defendants herein.

For all of which let execution issue in accordance with the foregoing judgment.

To all of which the Cross-Plaintiffs, Henry Bradford, and wife, Almeta Bradford, through their attorney in open Court

excepted and gave notice of appeal to the Court of Civil Appeals for the Fifth Supreme Judicial District of Texas at Dallas.

ENTERED this the 11th day of December, 1969.

/s/ DEE BROWN WALKER

Judge

APPENDIX B

No. 498

APPEAL FROM THE 162nd JUDICIAL DISTRICT COURT OF DALLAS COUNTY, TEXAS

HENRY BRADFORD *et ux*,

Appellants,

v.

WALTON E. THOMPSON *et al*,

Appellees.

This is an appeal from a summary judgment rendered in favor of the plaintiffs, Walton E. Thompson et al, in trespass to try title action.

The controversy arose in this manner: On October 13, 1964, defendants, Henry Bradford and wife, entered into a contract with Style-Rite Homes, Inc. for the purchase of a house and lot situated in Dallas County for a total consideration of $8,000.00 payable $1,200.00 in cash, and "$6,800.00 mortgage, $60.00 per month, principal and interest 6%, plus taxes and insurance." At the time of the execution of the contract Style-Rite did not own the property but was in the process of buying the same from plaintiff Walton E. Thompson. On October 15, 1964, two days after the execution of the contract, Style-Rite purchased the property from Thompson, assuming the unpaid balance due upon a note to Murray Mortgage Company in the amount of $5,246.66 and also delivering to Thompson its second lien note in the amount of $1,553.34. On the same date, Style-Rite executed a deed conveying the property to the Bradfords. The deed recited a total consideration of $8,000.00, payable $1,200.00 in cash and the assumption of the balance due on the first lien note held by Murray Mortgage Company in the amount of $5,246.66, together with the assumption of the second lien note executed by Style-Rite to Thompson in the amount of $1,553.34. The assumption clause in the deed recited that each of said notes was payable as provided therein and was

secured by a deed of trust. W. B. Post was named as trustee in the deed of trust securing the second lien note. Prior to consummation of the sale, the Bradfords demanded a title policy. After Fidelity Title Company agreed to issue the policy the closing of the sale took place at the office of the title company. Between the dates of October 19 and October 26, 1964, the parties appeared there at various times bringing the signed instruments, checks and etc. W. B. Post, the agent of the company, was in charge of the closing. After various monies and documents had been received, he recorded the deed and other instruments with the County Clerk of Dallas County. The deed, together with the title policy, was received by the Bradfords on or about November 2, 1964, and they took possession shortly thereafter. Several days later the Bradfords received a letter from Security Savings & Loan Association advising them that the $1,553.34 note assumed by them in their deed, had been deposited with the association for collection. The letter further advised them that the $10.00 monthly payments were to be made to the association commencing on November 15, 1964. Thereafter, the Bradfords promptly made the payments due under each of the notes. In August, 1964, they paid off the larger note to Murray Mortgage Company approximately four years in advance of the maturity date. Immediately thereafter they voluntarily increased their payments on the $1,553.34 note from $10.00 a month to $70.00 per month and continued to make such payments until February, 1967, when they stopped making any payments thereon. By letter dated June 5, 1967, Thompson through his attorney, notified the Bradfords that the second lien note was in arrears and that less payments were made current, the property would be posted for sale under the terms of the deed of trust. No further payments having been made notice of sale was duly posted by Clifford Thyfault, the duly appointed substitute trustee, and the property was subsequently sold on January 2, 1968, to plaintiff, Walton E. Thompson, for the sum of $2,000.00. Thompson called upon the Bradfords to relinquish possession but they refused to do so. He then instituted a forcible entry and detainer

suit against them. Being unsuccessful in such suit, Thompson then brought suit against them in trespass to try title which is the basis of the present litigation. In reply thereto the Braadfords answered with a plea of not guilty and by a cross-action for damages for fraud. In addition, they also filed cross-actions against Style-Rite Homes, Inc., hereinafter referred to as "Style-Rite"; Security Savings Association, hereinafter referred to as "Security"; W. B. Post, hereinafter referred to as "the trustee"; Fidelity Title Company and Security Title & Trust Company, hereinafter referred to as "the title company."

The cause came on for hearing before the trial court upon the various motions for summary judgment filed by plaintiff, Walton E. Thompson, and all other cross-defendants as well as motions for partial summary judgments on behalf of the Bradfords. After a hearing, the trial court granted summary judgments in favor of the plaintiff and all cross-defendants. The motion of the Bradfords for a partial summary judgment was denied. From this judgment the Bradfords duly perfected this appeal.

By the first point of error defendants urge that the trial court erred in granting summary judgment in favor of the plaintiff and cross-defendants because they contend that the pleadings and summary judgment evidence create genuine issues of disputed facts in each of the following respects.

First, they argue that there is a genuine issue of disputed fact upon the question of whether or not a fraud was perpetrated upon them by Thompson, Style-Rite and Post in connection with their purchase of the property. While they do not contend that any of the foregoing parties made any specific misrepresentations, they take the position that the contract of sale contained a false representation in that it stated that there would be only one mortgage against the property whereas the deed recited the assumption of two mortgages. They argue that the creation of the second lien prior to the sale was in direct contradiction with the terms of the purchase contract and constituted a fraudulent scheme to mislead them. As we understand it, they argue that since it was represented that there would be only one lien they

were led to believe that the $1,553.34 note was not secured by a lien; that they relied upon the representation that there was only one lien and in reliance thereon refused to make payments on the $1,553.34 note and as a result suffered a loss by reason of the foreclosure. We are of the opinion that the evidence offered by appellants fails to establish a cause of action for fraud.

In the first place we do not believe that it can be said that the alleged representation caused their loss. In order to sustain a cause of action for fraud, appellants had the burden of showing that the representation proximately caused their damage. Hayden v. Dunlap, 84 S.W. 2d 306 (Tex. Civ. App., Dallas, 1935). Assuming arguendo that Style-Rite represented that the mortgage was to be a single mortgage and that such constituted a false representation, and that they were induced to accept a deed whereby they assumed two mortgages, we do not believe that the assumption by them of two mortgages was the cause in fact of the foreclosure. Appellants do not dispute the fact that the sum of $6,800.00 was to be secured by some type of lien, nor do they dispute the fact that the deed provided for a deferred consideration in exactly the amount of $6,800.00 as provided in the contract. Therefore, appellants knew the deferred purchase price of $6,800.00 was to be included in one lien or two liens, that upon the consummation of the sale by the deed, they would thereafter be obligated to pay the $6,800.00. That they did not pay the full amount of $6,800.00 prior to the foreclosure is without dispute. It is without dispute that they stopped making any payments on the note long before the foreclosure proceedings were instituted. Had they not refused to discharge their obligation, the note would have remained current and the second lien would not have been available to Thompson for foreclosure. Therefore, appellants' damages resulted not because the deed provided for the assumption of two liens rather than one, but was directly and proximately caused by the appellants' failure to pay the full amount of the $6,800.00 as they agreed to do in their contract of purchase.

There is still another reason why we do not believe appellants have raised a disputed fact issue upon the question of fraud. The only theory upon which a party is permitted to recover or defend himself because of fraud, is that he believes such representations, and, relying upon them contracted or acted to his hurt. In no event can a recovery be had if either of these elements is wanting. It is imperative that the complaining party believe the false representations to be true at the time he acted thereon.

In the case of Thrower v. Brownlee, 12 S.W. 2d 184 (Tex. Comm. App., 1929), it is said that:

> "* * * Where false representations or promises are made to induce another to act, and, before such other does act, he learns of the falsity of such representations or promises, it cannot of course be said that he relied upon them believing them to be true, for, knowing their falsity, he has not been deceived. Deception is the very essence of an action for deceit, and that which does not deceive cannot be deceit within legal contemplation. It is true that one who makes a false statement, inducing another to act to his hurt, will not be heard thereafter to say the other should have been diligent to inquire as to the truth of the matter, for, in the absence of actual knowledge to the contrary, the one to whom the misrepresentation has been made has a right to rely upon it. Buchanan v. Burnett, 102 Tex. 492, 119 S.W. 1411, 132 Am. St. Rep. 900. But, where actual knowledge of the falsity of the statement or promise is brought home to the person to whom it is made before he has acted to his hurt, a different question is presented. It is then not a question of diligence but of actual knowledge, which, as matter of fact and of law, negatives deception. The authorities everywhere sustain this contention, and nowhere more clearly than in Texas." (citing cases)

The foregoing rule, of course, applies only to those cases where, at the time of the discovery of the fraud, the contract was wholly executory, or, in other words, the party com-

plaining had not changed his position for the worse, and could recede without suffering injury. Thrower v. Brownlee, supra; 13 A.L.R. 2d 807.

At the time Style-Rite delivered the deed to W. B. Post, for delivery to the Bradfords, the contract was wholly executory. Appellants take the position that they did not read the deed or know of its contents until the time they stopped making payments thereon. While the rule seems to be that a party to whom representations are made has a right to rely upon such representations, and is not called on to make an investigation to ascertain their truth or falsity, yet there is a limitation to the rule in that he must not be in possession of information showing the utter falsity of the alleged representation. Wortman v. Young, 235 S.W. 559 (Tex. Comm. App. 1921). The Bradfords do not dispute the fact that they had access to the deed prior to the consummation of the sale. A reading of the deed would have readily shown that they were assuming two mortgages rather than one. The general rule is that the grantee in a deed accepted by him is a party to the deed and though he does not sign it, he is concluded by the recitals in the deed. Greene et al v. White et al, 153 S.W. 2d 575 (Tex. Sup., 1941). Moreover, a party claiming through a deed is generally held to have notice of all facts recited therein or fairly disclosed by the instrument whether he has actually seen or read it, or has any knowledge of its contents. 59 Tex. Jur. 2d, sec. 754, p. 277-280; Sunderman v. Roberts, 213 S.W. 2d 705 (Tex. Civ. App., San Antonio, 1948, n.w.h.); Tuggle v. Cooke, 277 S.W. 2d 729 (Tex. Civ. App., Ft. Worth, 1955, err. ref., n.r.e.). Appellants give no excuse for not having read the deed. It does not appear in the record that they failed to read the deed, or have it read or explained to them, because of any act or conduct on the part of any of the appellees or their agents. After the deed had been delivered to W. B. Post for delivery to appellants, they appeared at his office and paid the down payment on the property. Therefore, we think it must be said that it appears as a matter of law that notwithstanding the fact that they did not read the deed, appellants were nevertheless charged with knowledge of the con-

tents thereof at the time that they accepted it. National Equitable Soc. of Belton v. Carpenter, 184 S.W. 585 (Tex. Civ. App., Texarkana, 1916).

We copy from Carver v. Moore, 288 S.W. 156, 158, by the Commission of Appeals, the following:

> "'Actual knowledge of the fraud is not required; reasonable prudence must be exercised to discover the fraud, and knowledge of acts sufficient to put one upon inquiry will operate as notice of the fraud. Kuhlman v. Baker, 50 Tex. 630; Bass v. James, 83 Tex. 110, 18 S.W. 336; Powell v. March (Tex. Civ. App.) 169 S.W. 936.
>
> "'The presumption is that, if the party affected by any fraudulent transaction or management might, with ordinary care and attention, have seasonably detected it, then he seasonably had knowledge of it. Wood v. Carpenter, 101 U.S. 135-143 (25 L. Ed. 807); Bass v. James, 83 Tex. 110, 18 S.W. 336.'"

See also Lindsey v. Dougherty, 60 S.W. 2d 300 (Tex. Civ. App., 1933). Thus by reason of the deed, the Bradfords as ordinary prudent persons, were charged with knowledge of the fact the deed provided for the assumption of two mortgages. Consequently, they could not have been deceived by the alleged misrepresentation in the contract that there would be only one mortgage. As we view it, the record negatives deception, and as a result fails to show a cause of action for fraud.

Appellants next contend that there is a disputed fact issue upon the question of whether or not the holder of the note elected to mature the indebtedness. The record shows that Thompson, the holder, through his attorney, notified the Bradfords that the note was in arrears and that unless brought current the property would be posted for sale under the terms of the deed of trust. There being nothing to the contrary, it therefore appears that the holder of the note exercised his right to mature the same.

Appellants also contend that since the second lien was not of record when they accepted the deed they were bona-fide purchasers of the property without actual or construc-

tive notice of the second lien. The assumption of the second lien was clearly set forth in the deed. Therefore, as purchasers they were charged with notice of the existence of the lien regardless of whether recorded or not. 59 Tex. Jur. 2d, sec. 754, p. 277-280.

In their second point of error, the Bradfords contend that the trial court erred in refusing to grant them a partial summary judgment against the holder of the note because they contend that the evidence fails to show that they were in default upon the date of foreclosure. Therefore they say that, as a matter of law, the foreclosure was null and void. In this connection they argue that since the evidence shows they voluntarily commenced paying the sum of $70.00 per month on the second lien note rather than $10.00 per month as called for therein, such excessive payments constituted payment in advance, and if such excess payments be applied at the rate of $10.00 per month nothing was due and owing on the note as of the date of foreclosure.

The note recites in part, as follows:

> "The principal of this note is payable in equal monthly installments of $10.00 each including interest, said installments to be credited first to the interest accrued to date of such installments and the balance to the reduction of principal; the first installment being due and payable on or before the 15th day of November 1964 and one installment to become due and payable on or before the 15th day of each succeeding month thereafter for a period of 136 months; at that time the payments will be increased to $60.00 per month until interest and principal is paid in full. The interest on this note is payable as set out above and all past due principal and interest shall bear interest from maturity at the rate of ten per cent per annum."

The problem, as put by the appellants, is this: Where a person is obligated to make equal payments on or before a certain day of each month, will an excess in one month be applied to satisfy a required payment in a subsequent month. A calculation of the interest due each month on the

$1,553.34 note commencing on the date thereof shows that the $10.00 payments were never sufficient to discharge the interest accruing each month, much less pay anything on the principal. Thus at the time the Bradfords commenced making the $70.00 monthly payments the interest was in arrears and nothing had been paid on the principal.

It seems to be the rule in this State that where both principal and interest is due, and partial payments are made, the payments should first be applied to the discharge of the interest then due, and if the payment exceeds the interest then due, the surplus should be applied toward discharging the principal, and thereafter, the interest is to be computed on the balance of the principal then due. If the payment is less than the interest, the surplus of interest must not be taken to augment the principal but interest continues on the former principal until the payments, taken together, exceed the interest due and then the surplus is to be applied toward discharging the principal, and interest is to be computed on the balance of the principal as before. This is the so called "United States Rule", and is recognized in Texas. *Tooke v. Bonds*, 29 Tex. 419; *J. I. Case Co. v. Laubhan*, 64 S.W. 2d 1079 (Tex. Civ. App., Amarillo, 1933, no writ); *Community Savings and Loan Association v. Fisher*, 409 S.W. 2d 546 (Tex. Sup.); 47 C.J.S., Interest, sec. 66. Applying the foregoing rules to the facts before us, the excess payment constituted payment on the principal and would not relieve appellants from making their regular monthly payments. It therefore conclusively appears that the note was in default long before the date of the foreclosure. The point appears to be without merit and is overruled.

Appellants assert by their third point that the foreclosure sale, as a matter of law, was void because the property was sold for inadequate consideration. In this connection the record shows without dispute that the property was purchased by Thompson for the sum of $2,000.00. According to the undisputed affidavit testimony of appellant, Henry Bradford, the property had a market value of $10,000 on the date of foreclosure.

A mere inadequancy of consideration alone does not render a foreclosure sale void. *Tarrant Savings Association v. Lucky Homes, Inc.*, 390 S.W. 2d 473 (Tex. Sup., 1965). For avoidance and in conjunction, there must be evidence of irregularity, though slight; which irregularity must have caused or contributed to cause the property to be sold for a grossly inadequate price. *Sparkman v. McWhirter*, 263 S.W. 2d 832 (Tex. Civ. App., Dallas, 1953, writ ref.). The record fails to show any such irregularities.

By the fourth and fifth points appellants urge that the trial court erred in refusing to grant them a partial summary judgment against the title insurance company. In this connection they say that the $1,553.34 second lien renders their title defective and the title company not having excepted same from the policy is, as a matter of law, liable to them for the loss sustained by them by reason of the lien. The company takes the position that the trial court properly granted a summary judgment in its favor because appellants' pleadings show, as a matter of law, that the title policy did not extend to the fact situation alleged by appellants. We have concluded that this contention must be sustained.

While the insuring clause in the policy in question guarantees appellants a good and indefeasible title, it contains this significant exception: "Nothing contained in this policy shall be construed as insuring against loss or damage by reason of * * * claims arising under any obligation of the assured; * * *." Appellants by their pleading incorporated the policy by reference. They also incorporated by reference the deed in which they assumed the second lien. Thus, appellants' pleadings, on the face thereof, show not only the contract excluding liability, but also show facts bringing appellants' alleged cause under the exclusion clause. Consequently, their own pleadings demonstrate that no liability exists under the policy. In other words, the pleadings show, as a matter of law, that under the circumstances alleged by the appellant, the title company had no duty to indemnify them for their loss because the defect was one which arose by reason of an obligation assumed and therefore was expressly excepted from the contract. *Steel Erection Com-*

pany v. Travelers Indemnity Company, 392 S.W. 2d 713 (Tex. Civ. App., San Antonio, 1965, writ ref., n.r.e.); *Buffington v. Atlanta Title & Trust Company*, 159 S.E. 297 (Geo. Court of Appeals, 1931). Based upon the pleadings alone the trial court was therefore authorized to enter a summary judgment against appellants.

Finding no reversible error the judgment is affirmed.

JAMES H. MOORE
Associate Justice

November 19, 1970

Filed November 19, 1970

APPENDIX C

IN THE SUPREME COURT OF TEXAS

No. B-2503

From Dallas County
Fifth District

HENRY BRADFORD, *et ux.*

Petitioners,

v.

WALTON E. THOMPSON, *et al.*

Respondents.

Walton E. Thompson sued Henry Bradford and his wife in trespass to try title. The Bradfords answered with a plea of not guilty and filed a counterclaim for damages for fraud. In addition, they also filed cross-actions against Style-Rite Homes, Inc. ("Style-Rite"), Security Savings Association ("Security"), W. B. Post ("trustee"), Fidelity Title Company and Security & Trust Company ("title companies") and joined Mrs. Thompson as an involuntary plaintiff. Various motion for summary judgment were filed by the plaintiffs and by all the cross-defendants. The Bradfords filed a motion for a partial summary judgment. The trial court granted the motions for summary judgment in favor of the plaintiffs and the cross-defendants, and the court of civil appeals affirmed. 406 S.W. 2d 932. We affirm in part and reverse in part the judgment of the court of civil appeals and render judgment in that part of the cause reversed.

The controlling issue in this case is whether or not the Bradfords were in default at the time of the foreclosure by Thompson of a second lien on the property here in dispute. The following facts gave rise to this lawsuit. On October 13, 1964, Bradford and his wife entered into a *contract* with Style-Rite for the purchase of a house and lot situated in Dallas County for a total consideration of $8,000, payable

$1,200 in cash, "$6,800.00 mortgage, $60.00 per month, principal and interest 6%, plus taxes and insurance." Style-Rite did not own the property at the time the contract was executed but was in the process of buying it from Thompson. On October 15, 1964, two days after the execution of the contract, Style-Rite purchased the property from Thompson, assumed the unpaid balance due upon a note to Murray Mortgage Company in the amount of $1,553.34 and delivered to Thompson its second lien note in the amount of $1,553.34.

Also on October 15, Style-Rite executed a *deed* conveying the property to the Bradfords. The deed recited a total consideration of $8,000, payable $1,200 in cash and the assumption of the balance due on the first lien note held by Murray Mortgage Company in the amount of $5,246.66, together with the assumption of the second lien note executed by Style-Rite to Thompson in the amount of $1,553.34. The assumption clause in the deed recited that each of said notes was payable as provided therein and was secured by a deed of trust. The deed of trust securing the second lien note named W. B. Post as the trustee. The Bradfords demanded a title policy prior to consummation of the sale. The closing of the sale took place after Fidelity Title Company agreed to issue the policy. The trustee, an agent of the title company, was in charge of the closing. The parties appeared at the title company office at various times between October 19 and October 26, 1964, bringing the signed instruments, documents and checks. The trustee subsequently recorded the deed. The title policy was received by the Bradfords in the mail around November 2, 1964. They took possession of the property here in dispute shortly thereafter. Subsequently they received the deed.

The Bradfords also received a letter dated November 11, 1964, from Security Savings Association, advising them that the $1,553.34 note assumed by them in the deed had been deposited with Security for collection. The letter indicated that $10 monthly payments were to be made to Security beginning November 15, 1964. Thereafter, the Bradfords promptly made the payments due under both of the notes.

In August of 1966 they paid off the larger note to Murray Mortgage Company approximately four years ahead of the maturity date. Immediately thereafter they voluntarily increased their payments on the $1,553.34 note from $10 a month to $70 per month and continued to make such payments until February, 1967, when they stopped making any payments. The Bradfords maintain that they stopped making payments only because they were refused the right to pre-pay the second lien note in its entirety.

Thompson, through his attorney, by a letter dated June 5, 1967, notified the Bradfords that the second lien note was in arrears and that unless the payments were made current, the property would be posted for sale under the terms of the deed of trust. No further payments were made and the property was subsequently sold on January 2, 1968 to Thompson. Thompson called upon the Bradfords to relinquish possession but they refused; he then instituted a forcible entry and detainer suit against them, but was unsuccessful. He then brought this suit in trespass to try title. The parties were joined by the various pleadings noted above.

The Thompsons plead the title they acquired by the foreclosure sale. The Bradfords filed a general denial and a counterclaim which alleged, *inter alia*, fraud on the plaintiffs' part in connection with the inclusion of the second lien note for $1,553.34 in the terms of the deed. The Bradfords also specifically alleged that the trustee's sale of January 2, 1968, was void since there was no actual default in the payments due at that time. The Bradfords also brought cross-actions against Style-Rite and the trustee alleging fraudulent misrepresentation; against the title companies for the value of their policy with those companies and for attorneys' fees; and against Security for fraudulent misrepresentation and for willfully and maliciously injuring the cross-plaintiffs by refusing to let them pre-pay the second lien note.

The original plaintiffs and all the cross-defendants filed motions for summary judgment maintaining, *inter alia*, that the Bradfords had notice of the terms of the deed before it

was signed and were charged with knowledge of the second lien note and deed of trust and that thus no fraud could have been practiced upon them. The plaintiffs also asked for summary judgment on their original suit for title and possession. The title companies, in addition, pleaded that this type of "defect" of title was specifically excluded by the policy that they had issued as it was brought about by the fault of the insured. The Bradfords filed a motion for partial summary judgment maintaining that, as a matter of law, they were not in default upon the date of foreclosure and that the foreclosure was and is null and void. The motion also asked for summary judgment against the title companies except on the issue of damages.

On the basis of the various documents, instruments and interrogatories the trial court granted the motions of the original plaintiffs and the cross-defendants and denied the motion of the Bradfords. The court of civil appeals affirmed.

We reverse the judgment of the court of civil appeals in as far as it upholds the granting of the plaintiffs' motion for summary judgment as to title and possession. We conclude that the note was not in default at the time of foreclosure, and thus the foreclosure was null and void.

The pertinent part of the note provides as follows:

> The principal of this note is payable in equal monthly installments of $10.00 each including interest, said installments to be credited first to the interest accrued to date of such installments and the balance to the reduction of principal; the first installment being due and payable on or before the 15th day of November 1964 and one installment to become due and payable *on or before* the 15th day of each succeeding month thereafter for a period of 136 months; at that time the payments will be increased to $60 per month until interest and principal is paid in full. The interest on this note is payable as set out above and all past due principal and interest shall bear interest from maturity at the rate of ten per cent per annum. (Emphasis ours).

The Bradfords had paid $700 to Security on the second lien note as of February, 1967, when only $280 would have been required to have been paid under the note's schedule of payments. As of the date of foreclosure, January, 1968, a total of $390 was required to have been paid under the terms of the note.

The original plaintiffs and the cross-defendants argue, and the court of civil appeals reasoned, that the excess payment constituted payment on the principal and did not relieve the Bradfords from making regular monthly payments to cover the interest. It is our belief that the rules governing application by a creditor of payments made by a debtor are inapposite here. Those rules are designed for situations where there are two or more debts being held by a creditor but there has been only one payment. 70 C.J.S. *Payment* § 72 (1951). The question here is not one of application of payments, but rather will an excess payment in one month be applied to satisfy a required payment in a subsequent month when an obligation calls for payments "on or before" a certain day of each month.

There are few cases dealing with this precise point. In *McBride v. Stewart*, 68 Utah 12, 249 P. 114 (1926), an installment agreement in a contract of sale provided for a down payment of $74 and installments of "$30 or more on or before the 25th day of each following month." The Utah Supreme Court held that the contract required the purchaser to make a payment in every calendar month. It is apparent that the words "or more" make this a strong case for the holder of the note: *Accord*, *DeVilliers v. Balcomb*, 79 N.M. 572, 446 P. 2d 220 (1968). It has also been noted, however, that "[i]n the absence of the words quoted, the contention would seem plausible that the vendor could not terminate the contract if the average payments made complied with those stipulated in the contract." Annot., 48 A.L.R. 273 (1927).

In an earlier case, the California Supreme Court was confronted with a situation more like the instant one and reached an opposite result from that reached by the Utah

Court. In *Los Angeles Investment Co. v. Wilson*, 181 Cal. 616, 185 P. 853 (1919) the parties had entered into a lease-purchase agreement which the court construed in the same manner as a contract of sale. Under the agreement, payments of $36 per month were to be applied first toward accrued interest and the balance towards the principal. The defendant-obligor had made irregular payments and when the suit was commenced had made no payments at all for several months. The average of the payments up to the commencement of the suit were, however, over $36 per month. The court held the defendant not to be in default, and that any amount paid in excess of $36 in any given month was to be considered another payment being made "on or before" any date on which he failed to make a $36 payment.

We find the logic of the *Wilson* case persuasive and conclude that the Bradfords' motion for partial summary judgment insofar as it requests that the foreclosure of January 2, 1968, be set aside, should have been granted. By the undisputed facts in this case, the Bradfords, as a matter of law, were not in default on the second lien note on the date of foreclosure. They had, as noted above, made payment well in excess of what was required under the terms of the note.

It follows that the trial court's summary judgment awarding the Thompsons title and possession of the premises in controversy and ordering that the Bradfords take nothing by their suit to remove cloud on their title to such premises is erroneous and must be reversed. It is accordingly ordered that the causes of action of the Thompsons and the Bradfords concerning title and possession in and to the premises in question be, and they are hereby, severed; that as to such severed causes of action the judgments of the courts below awarding title and possession of the premises to the Thompsons and ordering that the Bradfords take nothing with respect to their cause for removal of cloud are reversed; and it is ordered, adjudged and decreed that the Thompsons' motion for summary judgment be denied and the Bradfords' motion for partial summary judgment be granted and that the trustee's deed to the Thompsons be, and the same is

hereby, cancelled and held for naught. As to all other causes of action, the judgment of the court of civil appeals is affirmed.

Sears McGee
Associate Justice

Opinion delivered July 21, 1971.

Supreme Court, U.S.
FILED
JAN 31 1972
E. ROBERT SEAVER, CLERK

In the

Supreme Court of the United States

No. 71-859

HENRY and ALMETA BRADFORD,

Petitioners,

v.

WALTON E. THOMPSON, et al,

Respondents.

RESPONSE TO PETITIONERS' APPLICATION FOR WRIT OF CERTIORARI

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In the

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HENRY and ALMETA BRADFORD,

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Respondents.

RESPONSE TO PETITIONERS' APPLICATION FOR WRIT OF CERTIORARI ON BEHALF OF RESPONDENTS W. B. POST, FIDELITY TITLE COMPANY AND SECURITY TITLE & TRUST COMPANY

To The Honorable Supreme Court Of The United States:

Now come W. B. POST, FIDELITY TITLE COMPANY and SECURITY TITLE & TRUST COMPANY, Respondents herein, and file this their response to Petitioners' Original Application for Writ of Certiorari and in support thereof respectfully show to the Honorable Supreme Court of the United States the following:

STATEMENT OF THE CASE

The facts and nature of the case are correctly set forth in the opinions of the courts below (Texas Supreme Court

and the Court of Civil Appeals for the 12th Supreme Judicial District of Texas), both of which are contained in *haec verba* in the Appendix to the Brief of Petitioners. A summary of the facts pertinent to the questions presented for review is as follows:

1. Henry Bradford and wife, Almeta Bradford, as purchasers, contracted for the purchase of property in Dallas, Texas, on October 13, 1964 for Eight Thousand Dollars ($8,000.00), payable One Thousand Two Hundred Dollars ($1,200.00) in cash and financing Six Thousand Eight Hundred Dollars ($6,800.00) in mortgage indebtedness.

2. By deed dated October 15, 1964, filed for record with the County Clerk of Dallas County, Texas, on November 2, 1964 the property was deeded to the Bradfords for the consideration there expressed including the assumption and agreement to pay Six Thousand Eight Hundred Dollars ($6,800.00) in mortgage indebtedness (represented by the unpaid principal balance of a vendor's lien note dated January 10, 1956, of Five Thousand Two Hundred Forty-Six Dollars and Sixty-six Cents ($5,246.66) and a second lien note in the amount of One Thousand Five Hundred Fifty-three Dollars and Thirty-four Cents ($1,553.34)) (Tr. p. 81).

3. The Bradfords then accepted the benefits of the deed and moved upon the premises on or about November 10, 1964.

4. Fidelity Title Company, agent, acting by W. B. Post, issued Security Title & Trust Company title policy to the Bradfords on November 2, 1964. Such policy failed to refer

to the second lien note in the amount of One Thousand Five Hundred Fifty-three Dollars and Thirty-four Cents ($1,553.34). Nevertheless, Mr. Bradford promptly commenced to make payments and thereafter made payments on both notes over a period of more than eighteen months, discharging one note in its entirety.

5. Subsequently, the Bradfords stopped making payments on the second lien note because of the dispute between the Bradfords and the holder of the note arising out of the holder's refusal to permit prepayment of the second lien note.

6. In the suit that ensued between Thompson, holder of the note, and the Bradfords, Petitioners herein, the Bradfords, also filed a counterclaim for damages for fraud and for other relief against these Respondents.

Respondents are particularly surprised at the statement on page 6 of Petitioners' Application that

> "The Bradfords had no actual knowledge that the second lien in question was containeed in their deed, as the Bradfords relied on their title policy to the exclusion of their deed in order to determine the status of their title."

for the reason that Mr. Bradford admittedly promptly began to make payments on both notes to two different companies and continued to make such payments until one note was discharged in its entirety and until the dispute arose involving the second note.

ARGUMENT AND AUTHORITIES

The sole question which Petitioners bring to this Court is whether or not the Court should take jurisdiction because of denial to Petitioners of due process of law, when, in reality, Petitioners' Application for Writ of Certiorari patently discloses that Petitioners are really seeking to set aside a State Court judgment (having been unsuccessful in the courts below) on the ground the Courts heretofore have erred in deciding against them. The record, as well as Petitioners' Application for Writ of Certiorari, itself, clearly reflects that (1) the difficulties and expenses of Petitioners resulted entirely from the conduct of Petitioners themselves as a consequence of the dispute with the holder of the second lien note over the question of the prepayment of that note and (2) that their grievances were thoroughly and fairly considered in three courts below. The mere fact that the Petitioners were unsuccessful in the Texas Court with respect to the application of the adjective law of that state to the case does not show that there has been a violation of the due process guarantee. This Court has previously stated on many occasions, as in the case of *Worcester County Trust Company v. Riley*, 302 U.S. 292, that "in any case the Constitution of the United States does not guarantee that the decisions of the State Courts shall be free from error * * * or require that pronouncements shall be consistent".

Respondents urge that the decision of the Supreme Court of Texas was absolutely correct, but even an erroneous decision by that Court on matters within its jurisdiction

does not deprive the unsuccessful party of his rights under the guarantee of due process where the parties have been fully heard in the regular course of judicial proceedings. In *Chicago Life Insurance Company v. Cherry*, 244 U.S. 25, Mr. Justice Holmes in delivering the opinion of the Court, stated:

> "Whenever a wrong judgment is entered against a defendant, his property is taken when it should not have been; but whatever the ground may be, if the mistake is not so gross as to be impossible in a rational administration of justice, it is no more than the imperfection of man, not a denial of constitutional rights. The decision of the Illinois courts, right or wrong, was not such a denial."

And to the same effect in a decision likewise considering the question of an appeal from an alleged erroneous decision on the part of the Supreme Court of the State of California was the opinion in *Neblett v. Carpenter*, 305 U.S. 297, to-wit:

> "All of these holdings concern matters of state law and amount at most to alleged erroneous constructions of the State's statutes by its own court of last resort. Such decisions would not be a denial of the due process guaranteed by the Fourteenth Amendment. We are, therefore, without jurisdiction to review the state court's decision of any of those questions."

Respondents respectfully urge that no grounds for jurisdiction is raised and no federal question is presented by the contentions of Petitioners that the judgments of the State Courts, under the circumstances, deprived Petitioners of due process of law in violation of the Fourteenth Amendment; it is not the function of the Supreme Court of the United States to serve as an additional appellate step to

review State Court decisions. In a memorandum decision denying Application for Writ of Certiorari on a question similar to that presented here this court again affirmed the proposition that Federal Courts are not authorized to act in substantially appellate capacity to review State Court decisions. *Resolute Insurance Company v. North Carolina*, 393 U.S. 978.

The Petitioners charge that both of the Appellate Courts below completely overlooked the matter of the necessity of Respondents' specifying the exceptions under the Respondents' title insurance policy taking away the coverage of the insurance contract. Such was not the case. The Court of Civil Appeals held that, as a matter of law, the Petitioners by their own pleadings demonstrated that no liability existed under the policy; the Supreme Court of Texas affirmed the judgment of the Court of Civil Appeals in all respects except as to the point involving title and possession.

Assuming arguendo that the Supreme Court of the United States has jurisdiction of the State Court judgments for the purpose of additional appellate review, Respondents again urge that the application of Rule 94 by the courts below to the facts there presented was wholly correct.

The jurisprudence of the State of Texas supports the proposition that the purpose of Rule 94 is to require that in the event an insured suffers from a loss covered by an insurance contract but which said general coverage is limited and avoidable by virtue of certain special exceptions or exclusions, then the insurer must plead those exceptions or exclusions pursuant to the requirement of Rule 94; however,

there is first a cardinal requirement that the insured must allege and prove facts showing that the loss was one covered by the general hazards insuring clause, that it is actually part of the general hazard itself, contrary to the situation here in which the insurance policy general insuring clause does not and did not extend to the fact situation as pled by Petitioners, Mr. and Mrs. Bradford (Tr., p, 24).

The title policy initially states in its insuring provisions that Security Title & Trust Company guarantees to Henry Bradford and wife that they have good and indefeasible title to the property described. The policy then states that the Company "shall not be liable in a greater amount than actual monetary loss of assured". The Petitioners have suffered no loss; they contracted to assume $6,800.00 in mortgage indebtedness; they assumed $6,800.00 in mortgage indebtedness; they arbitrarily stopped payment on one of the notes comprising the $6,800.00 of indebtedness, and thereafter proceedings were instituted against them. The Petitioners suffered no loss as a result of any "defect of title", but any troubles, expenses or losses they have suffered have been occasioned by the intentional and overt conduct on the part of the Petitioners, themselves. Also provided in the terms of the policy on the insuring clause is the statement that "nothing contained in this policy shall be construed as insuring against loss or damage by reason of any claims arising under any obligation of the assured; or under any act, thing, or trust relationship, done, created, suffered or permitted by the assured". By virtue of the terms of the deed to the Petitioners, Petitioners assumed the payment of the second lien note; and by their own acts they

created the relationship established. Therefore, the title policy did not extend to any loss or damage resulting to Petitioners by virtue of the existence of the second lien note, and the lien created by virtue thereof. Elsewhere, the terms of the policy set out the specific exceptions and exclusions to which the policy was subject and not here involved. The voluntary assumption of the indebtedness is not such an exception or an exclusion but actually part of the general hazard insured against. The matter of the voluntary acts of the assured under the policy of insurance was a part of the insurer's *basic promise* (emphasis added); it is not the purpose of Rule 94 of the Texas Rules of Civil Procedure to require an insurer to allege that the voluntary acts were not covered by the basic promise. In this case, the voluntary acts clause does not limit the general liability for the loss covered by the general hazards; this is actually part of the general hazard itself; it is the very basis of the contract, containing provisions which constitute the integral parts of the Respondents' promise to the Petitioners. It is an element of the statement of the Respondents' basic promise to the Petitioners, as distinguished from exclusions subsequently made from a broader promise.

The question is one of construction as indicated in *Dorsky v. New York Life Insurance Company*, 315 Mass. 17, 51 N. E. 2d 761 and *Anthony v. The Mercantile Mutual Accident Corporation*, 38 N. E. 973, 26 L.R.A. 406. In *Merryman v. Employers National Life Insurance Company*, 416 S.W. 2d 609 (Tex. Civ. App., 1967, writ ref., n.r.e.) virtually the identical question was presented to the Beaumont court. The insured suffered a broken leg and subsequently had to

have the limb amputated; the insurance policy provided for coverage of the loss if the loss of Appellant's leg was occasioned as a result of accidental means solely and independently of all other causes. The insurance company denied that the loss for which the insured sought recovery was covered by the policy and did not specially plead the provisions limiting the coverage. The Appellant contended that the insurance company waived its defense by not specially pleading the provisions of the policy pursuant to Rule 94, Texas Rules of Civil Procedure. In the consideration of the case, the court held at p. 610, as follows:

> "We have concluded that the insuring clause itself is the key to the solution of this case. The general hazard insured against was not the loss of a foot, but the loss of a foot effected solely and independently of all other causes through external, violent and accidental means. The burden of proof was upon the plaintiff to allege and prove facts showing that the loss of his leg was covered by the policy, and this he failed to do."

The same conclusion was reached in *Alamo Casualty Co. v. Richardson*, 235 S.W. 2d 726 (Tex. Civ. App., 1951, writ ref., n.r.e.) where the court distinguishes where a clause is the very basis of the contract constituting integral parts of the promise to pay. The Court states that the declarations are "as we construe them, elements of the statement of defendant's basic promise to plaintiff, as distinguished from exclusions subsequently made from a broader promise". In the case of *Evans v. Pacific National Fire Insurance Company*, 367 S.W. 2d 85 (Tex. Civ. App., 1963, writ ref., n.r.e.),

the Court stated, citing *Preferred Life Insurance Co. v. Stephenville Hospital et al*, 256 S.W. 2d 1006, 1010 (Tex. Civ. App,, 1953, no writ hist.), that the insured persons had the burden of establishing their right to recover. The Court held that a clause was " 'not an exception to the "general liability" provided by "other provisions limiting such general liability" but is inherent in the provisions of the policy which define the maximum liability in the first instance. The limitation was, therefore, a part of and inseparable from the "general liability" as referred to in Rule 94 * * *' ".

SUMMARY OF ARGUMENTS

I.

The Supreme Court of the United States should not entertain a petition for writ of certiorari based on denial of due process under the Fourteenth Amendment where the basis for Petitioners' Application is simply disagreement with the decisions of the courts below rather than denial of opportunity to be fully and thoroughly heard on all matters of fact and questions of law.

II.

The 12th Court of Civil Appeals of Texas and the Supreme Court of Texas considered and properly applied Rule 94 of the Texas Rules of Civil Procedure.

CONCLUSION

Wherefore, premises considered, Respondents pray that for the reasons stated the Application for Writ of Certiorari be in all things denied.

BRADY, DRAKE & WILSON

By _____

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CERTIFICATE OF SERVICE

I, EDWARD J. DRAKE, attorney of record for Respondents W. B. Post, Fidelity Title Company and Security Title & Trust Company, in the above cause, do hereby certify that I have on this 27th day of January, 1972 forwarded a copy of the above and foregoing Response to Petitioners' Application for Writ of Certiorari to all of the following attorneys, being the attorneys for Petitioners and attorneys for Respondents, at the addresses indicated:

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